Supreme Court, U. S.
FILED
NOV 24 1980
MICHAEL RODAK, JR., CLERK

No. 80-465

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

PAPAGO TRIBAL UTILITY AUTHORITY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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November, 1980

DI CESARE - Printing - 331-6101 - Washington, D.C. 20006

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Petitioner asserted in its opening brief[1] that this case is one of the fundamental importance to the regulation of rates and services under several regulatory statutes. Intervenor, Arizona Public Service, has argued that this case is not of peculiar gravity and general importance, and that, therefore, it is not worthy of attention by this Court.[2] Subsequent events have demonstrated the

[1]Pet. Br. at 6.
[2]Int. Br. at 4.

correctness of petitioner's view. The decision below has already been used twice by the Court of Appeals as a landmark decision to find lack of jurisdiction to review orders denying motions to reject under two regulatory statutes other than the Federal Power Act and the Natural Gas Act.[3]

In *Aeronautical Radio, Inc.* v. *Federal Communications Commission,* No. 77-1333, *et al.* (D.C. Cir. June 24, 1980), the Court of Appeals first ruled that it had jurisdiction to review the refusal of the F.C.C. to reject a tariff filed under the Federal Communications Act and that the agency erred when it refused to reject a patently defective filing (Slip Op. at 24-28). On rehearing, though, the Court, relying on the instant decision, reversed itself and held that it lacked jurisdiction to review the F.C.C.'s refusal to reject the tariff.[4] Similarly, in *Earth Resources Company of Alaska* v. *FERC,* 628 F.2d 234 (D.C. Cir. 1980), the Court relying exclusively on its decision in this case held that FERC orders refusing to reject oil pipeline tariffs filed under the Interstate Commerce Act are not reviewable. Thus, the powerful impact of the instant decision on judicial review of administrative orders under a wide range of federal regulatory statutes which petitioner predicted is already being felt.

The decision below held that orders of administrative agencies denying motions to reject are interlocutory,

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[3]The Federal Power Act and the Natural Gas Act are *pari materia. F.P.C.* v. *Sierra Pacific Power Co.,* 350 U.S. 348, 353 (1955).

[4]Order of November 5, 1980 in No. 77-1333. Counsel for Intervenor General Electric Company have indicated that they will file a petition for *certiorari* in that case and will request that it be consolidated with this case.

rather than final.[5] Respondent[6] and intervenor[7] make this same argument. But, an agency order denying a motion to reject a rate or tariff filing is not interlocutory. Such action is plainly final in nature since it permits a proposed rate increase to take effect and denies consumers the right to pay no more than a just and reasonable rate which is specifically granted them by the Federal Power Act. That Act was enacted "to protect consumers against exploitation," *FPC* v. *Hope Natural Gas*, 320 U.S. 591, 610 (1944), and "to afford consumers a complete, permanent bond of protection from excessive rates and charges." *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, 388 (1959). This bond of protection is made manifest in the provisions of Section 205 of the Act (16 U.S.C. 824d) which permits only "just and reasonable rates" to be charged and makes all rates in excess thereof unlawful. The instant rate filing was unjust and unreasonable on its face because it showed that petitioners were entitled to a $148,000 rate reduction, and were being subjected to a $1,246,000 rate increase instead. Plainly then, the Commission's Order denying petitioner's motion to reject was a final order depriving them of their express statutory right to pay no more than the just and reasonable lawful rate.

Respondent (Br. 3-4) and intervenor (Br. 6) argue that an agency's refusal to reject a rate filing is merely an interlocutory first step in the *initiation* of an administrative proceeding dealing with the reasonableness of the rate. Thus, respondent (Br. 4) and

[5]Pet. Br., A-10 - A-11.

[6]Resp. Br., at 3.

[7]Int. Br., at 6.

intervenor (Br. 4) argue that the motion for rejection raises the same issues as those raised in the pending proceeding on the merits before the Commission. Their conclusion is squarely contrary to the holding of *Municipal Light Boards* v. *FPC*, 450 F.2d 1341, 1345-1346 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972), where the Court distinguished between agency rulings disposing of a controversy on the merits which it analogized to "summary judgment," and rejection of a party's filing for patent deficiencies which it analogized to "motions to dismiss on the face of the pleading." Respondent (Br. 4) and intervenor (Br. 8-10) argue that petitioners must make a showing of irreparable injury in order to obtain review. This argument is premised on their erroneous view that the orders here are interlocutory. Furthermore, no case has been cited, by either the Court below or by opposing parties which holds that a showing of irreparable injury is a condition precedent to review of a motion to reject for patent defects.

Respondent argues that the instant decision is not in conflict with *Southern Natural Gas Co.* v. *FPC*, 547 F.2d 826 (5th Cir. 1977), and *International Business Machines* v. *F.C.C.*, 570 F.2d 452 (2d Cir. 1978). Respondent rests this conclusion on the fact that none of these cases "even discusses the issue of reviewability." (Resp. Br. at 6). But, in both cases, the respective Courts of Appeals reached the *merits* of the case. Thus, in each case, the courts made a *sub silentio* determination that they had subject matter jurisdiction. Federal Courts are courts of limited jurisdiction. They must in all cases, make a determination of jurisdiction before proceeding to the

merits. This is true even when the parties fail to raise the issue. *Mansfield, C.&.L. M.Ry. Co.* v. *Swan,* 111 U.S. 379, 382 (1884); *Potomac Passengers Ass'n.* v. *Chesapeake & Ohio Ry. Co.,* 520 F.2d 91, 95 (D.C. Cir. 1975); *State of Alabama ex rel. Baxley* v. *Woody,* 473 F.2d 10 (5th Cir. 1971).

Moreover, not only is there conflict among the circuits, but there is also conflict of decisions within the District of Columbia Circuit.[8] In *Municipal Light Boards, supra,* the Court of Appeals decided the merits of the motion to reject after holding that the FPC's order denying the motion was reviewable. Similarly, in *Associated Press* v. *F.C.C.,* 448 F.2d 1095 (D.C. Cir. 1971), the Court reviewed the merits of the agency's denial of a motion to reject. The conflict within the District of Columbia Circuit is demonstrated most clearly in *City of Groton* v. *FERC,* 584 F.2d 1067 (D.C. Cir. 1978). In that case, the wholesale customer filed a motion to reject which was denied by the Commission. On petition for review, the Court of Appeals held:

> Consistently with the process described above, Commission authority to reject the rate schedule at the filing stage is limited to those filings which are patently defective on their face, *Municipal Light Boards, supra,* at 1346. A reviewing court's ability to require a rejection of a rate filing is even more circumscribed, being limited to a determination of whether the agency acted arbitrarily and capriciously in accepting the filing.

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[8]This is of considerable importance in view of that Circuit's preeminent position respecting appeals from orders of administrative agencies.

This is a clear finding by the Court of Appeals that it has jurisdiction to review denials of motions to reject and it conflicts squarely with the decision below.

The Court of Appeals (Pet. Br. at App. A-24) and respondent (Resp. Br. at 7) attempt to dismiss the holdings of *Associated Press, Municipal Light Boards,* and *City of Groton* as mere *dicta*. Respondent contends that the Court in those cases was discussing scope of review. This argument proves too much, though, because a determination of jurisdiction is a necessary predicate to any review.

Respondent (Br. 7) argues citing *Wisniewski* v. *United States,* 353 U.S. 901 (1957), that petitioner had a duty to first seek rehearing *en banc* in the Court of Appeals before coming to this Court. In *Wisniewski,* one panel of the Eighth Circuit, after remand, disagreed with another panel of that Circuit *in the same case*. To avoid collegial disputes, the panel certified the question to this Court under 28 U.S.C. 1254(3). *Wisniewski* addresses only the propriety of certification as a substitute for *en banc* consideration in such circumstances. There is nothing in *Wisniewski,* or the Rules of the Supreme Court which even suggest that a party must apply for rehearing *en banc* in cases involving intra-circuit conflicts before filing a petition for certiorari. Furthermore, Rule 35 of the Federal Rules of Appellate Procedure is clearly discretionary, and a party has no right to compel *en banc* adjudication. *Western Pacific Railway Corp.* v. *Western Pacific Railway Co.,* 345 U.S. 247, 259 (1953).

Respondent (Br. 5) errs in its claim that: "[t]he Commission's discretionary decision in this case to relax its own procedural rules is not subject to judicial review," citing *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 538-539 (1970). First, Section 205 of the Act clearly imposes the *substantive* requirement that only just and reasonable rates be charged and prohibits excessive rates which it declares unlawful. This binding legal requirement was violated when the agency permitted the intervenor to impose excessive charges of $1,488,000 per year upon petitioner by failing to reject a patently defective rate filing. Second, Section 35.5 of the Commission's regulations is both mandatory and substantive in its requirement that the Secretary *shall* reject rate filings which are patently void or are substantive nullities. Finally, in *American Farm Lines*, the Interstate Commerce Commission relaxed only data filing requirements, while here the FERC ignored a fundamental invalidity of the rate filing.

Lastly, respondent argues (Br. 5-6) citing *Southern Railway Corp.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979), that motions to reject should be treated in the same manner as motions to suspend rates which are not subject to review. The short answer to this claim is that in *Municipal Light Boards, supra,* at 1351, the Court expressly recognized that suspension orders are not reviewable while reviewing, and deciding on the merits the denial by the agency of the motion to reject. We also note that in *Seaboard* (at 454) this Court held that it would ". . . not lightly interpret a statute to confer unreviewable power on an administrative agency." Thus, the very case respondent relies on to bar review

here strongly rejects its thesis. Moreover, the decision in *Seaboard* is based on the explicit congressional intent as expressed in the relevant legislative history. 442 U.S. 444 at 454. Here, no such congressional intent has been shown as required by established case law.[9]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
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[9]*Barlow* v. *Collins*, 397 U.S. 159, 166 (1970); *Abbot Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967); *Rusk* v. *Cort*. 369 U.S. 367, 379-380 (1962).

CERTIFICATE OF SERVICE

I hereby certify that three copies of the reply brief for petitioner was mailed, postage prepaid, to all counsel of record for the parties.

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